

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERESA SMITH)	
Claimant)	
VS.)	
)	
USD 259)	Docket No. 227,946
Respondent,)	
Self-Insured)	

ORDER

Respondent appealed the July 29, 1999 Award entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on December 1, 1999.

APPEARANCES

Paul V. Dugan, Jr., of Wichita, Kansas, appeared for claimant. Richard J. Liby of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges a February 20, 1997 accident and resulting low back injury. Judge Clark found that claimant sustained a permanent back injury that constituted a five percent whole body functional impairment. The Judge determined claimant had a 38 percent permanent partial general disability by averaging a 44 percent wage loss and a 32 percent task loss.

Respondent contends the Judge erred by finding that claimant sustained any permanent impairment as a result of the February 1997 accident. Further, respondent argues that the Judge erred by using the average weekly wage that the parties stipulated to for determining the weekly temporary total disability rate.

Conversely, claimant argues that the Judge should have used the actual post-injury wage of \$150 to determine the wage loss rather than imputing a wage of \$225 per week, which the Judge found by multiplying claimant's post-injury hourly wage of \$7.50 by six hours per day that claimant allegedly had available to work at Children's World Learning Center. Therefore, claimant argues that the wage loss is 63 percent, which when averaged with the 32 percent task loss creates a 47.5 percent permanent partial general disability.

The only issues before the Appeals Board on this review are:

1. What is the nature and extent of claimant's injury and disability?
2. What is the appropriate average weekly wage for determining the temporary total disability rate?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

1. Claimant began working for respondent on a part-time basis in October 1996 as a lunchroom aide and later transferred into a full-time position as a distribution clerk in respondent's food service center.
2. On February 20, 1997, claimant injured herself while moving a tray of turkey breasts from the top shelf of a cabinet to another shelf. The parties stipulated that the incident arose out of and in the course of claimant's employment with respondent.
3. The various doctors who testified could not agree upon a functional impairment rating or even a diagnosis for claimant's alleged injuries. Dr. Jane K. Drazek, the medical director of Via Christi Rehabilitation Center and one of claimant's treating physicians, testified that according to the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment* claimant had a five percent whole body functional impairment from chronic low back pain with right-sided radiation. Additionally, Dr. Drazek testified that claimant had an absent right ankle jerk, which indicated nerve root involvement at the S1 level.

Dr. Jed D. Holmes, who is claimant's primary care physician and who saw claimant several times for her injuries, testified that a bone scan indicated that claimant had inflammation in the right sacroiliac joint and that x-rays indicated that she had mild degenerative disc disease at L5-S1, with mild degeneration in both sacroiliac joints.

Dr. Mark S. Dobyns, a specialist in internal medicine and occupational medicine, saw claimant at least three times and diagnosed right sacroiliitis, which the doctor stated could be a very painful condition.

But orthopedic surgeon Dr. Thomas Kneidel, who initially diagnosed lumbar strain, later testified that claimant had nonorganic pain. And orthopedic surgeon Dr. Jacob Amrani initially diagnosed back sprain but later testified that claimant had little wrong physiologically.

The Appeals Board is persuaded by the opinions of Dr. Drazek, Dr. Holmes, and Dr. Dobyns and finds that claimant did sustain physical injury as a result of the February 1997 incident. The Board affirms the Judge's finding that claimant sustained a five percent whole body functional impairment as a result of the work-related accident.

4. After being released from medical treatment, claimant requested to return to work for respondent. When respondent would not return her to work, claimant found employment with Children's World Learning Center where she earned \$7.50 per hour and worked approximately 20 hours per week. Claimant worked at Children's World Learning Center from January 16, 1998, through approximately March 22, 1999. Therefore, the Board finds that claimant was earning approximately \$150 per week for the 61.57-week period from January 16, 1998, through March 22, 1999.

5. Claimant contends that she can only work on a part-time basis. Dr. Drazek testified that claimant should avoid activities that increase discomfort and that she should avoid prolonged standing and walking, avoid lifting over 15-20 pounds on a frequent basis and 30 pounds on an occasional basis, and that she should have a job that allows her to alternate sitting and standing. The doctor felt that it was reasonable that claimant limited her workday to two to six hours per day. Further, Dr. Drazek agreed with Dr. Dobyn's opinion that the number of hours that claimant could work each day will be gauged by her level of pain and discomfort and the ability to tolerate those symptoms. Dr. Drazek acknowledges that working eight hours per day may be beyond claimant's capabilities.

Dr. Holmes testified that he had prescribed claimant Lortab, a narcotic, throughout the treatment that he administered to claimant. Dr. Holmes believes that claimant will need periodic physical therapy and possibly other medications. Further, Dr. Holmes testified that claimant does not exaggerate her symptoms and that limiting claimant to part-time work, or 20 hours per week, was reasonable. Finally, Dr. Dobyns testified that claimant's condition probably would not worsen with activity but that the chronic pain would require her to modify her activities.

The Appeals Board concludes that the greater weight of medical evidence establishes that it was reasonable for claimant to seek and work part-time employment. Therefore, claimant exercised good faith in seeking employment with Children's World Learning Center and working there through March 22, 1999. Claimant terminated her employment with the learning center after that date to pursue opening a competing business with a former supervisor.

6. As a result of the February 1997 accident, claimant has lost the ability to do 30 out of 94, or 32 percent, of the work tasks that claimant performed in the 15-year period before the accident. That finding is based upon Dr. Drazek's testimony and the opinions that she expressed after reviewing the task analysis prepared by human resources consultant Jerry D. Hardin.

7. When the Judge was taking stipulations at the regular hearing, the parties agreed that claimant's average weekly wage was \$404 per week.¹ The record does not disclose that either party requested permission to withdraw that stipulation before the case was submitted to the Judge for decision.

CONCLUSIONS OF LAW

1. The Award should be modified to increase the wage loss from 44 percent to 63 percent and, therefore, increase the permanent partial general disability from 38 percent to 47.5 percent.

2. Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by averaging the wage loss with the task loss. That formula is set forth in K.S.A. 1996 Supp. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*² and *Copeland*.³ In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability

¹ Regular Hearing, March 8, 1999; p. 4.

² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

as contained in K.S.A. 1988 Supp. 44-510e by refusing to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁴

3. As indicated in the findings above, claimant made a good faith effort to find appropriate employment following her medical release, which resulted in employment with Children's World Learning Center. Therefore, for the period through March 22, 1999, claimant's actual wages should be used to determine claimant's wage loss. Comparing the \$150 per week post-injury wage that claimant earned at Children's World Learning Center to the \$404 that claimant earned pre-injury, the Appeals Board concludes that claimant sustained a 63 percent wage loss.

For the period after March 22, 1999, the Appeals Board imputes \$150 as claimant's post-injury average weekly wage. As indicated above, claimant terminated employment with the learning center to pursue opening a competing business. In addition to seeking appropriate employment, a worker must also make a good faith effort in retaining appropriate employment. Under these facts, the Appeals Board concludes that the \$150 per week that claimant was earning at the learning center should be imputed to her for the period after she left. Should claimant later earn higher wages, the parties may seek review and modification of the award.

4. Averaging the 32 percent task loss with the 63 percent wage loss, the Appeals Board concludes that claimant has a 47.5 percent permanent partial general disability.

5. The parties stipulated that claimant's average weekly wage was \$404. That stipulation was not withdrawn. Therefore, the Judge acted properly in using that wage to compute claimant's benefits, including the temporary total disability benefit rate. The Appeals Board agrees with respondent's argument that fringe benefits should not be included in the average weekly wage computation before those benefits are terminated. But that issue was not presented to the Judge or preserved for determination when the parties at regular hearing unconditionally stipulated to the average weekly wage. Further, respondent fails to cite that part of the evidentiary record that establishes what claimant's

⁴ *Copeland*, p. 320.

fringe benefits were, the date that the benefits were discontinued, and their value. Our review of the record indicates that evidence was not introduced.

6. The Appeals Board adopts those findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board modifies the July 29, 1999 Award and increases the permanent partial general disability from 38 percent to 47.5 percent.

Teresa Smith is granted compensation from USD 259 for a February 20, 1997 accident and resulting disability. Based upon an average weekly wage of \$404, Ms. Smith is entitled to receive 28.15 weeks of temporary total disability benefits at \$269.35 per week, or \$7,582.20, plus 190.88 weeks of permanent partial general disability benefits at \$269.35 per week, or \$51,413.53, for a 47.5 percent permanent partial general disability, making a total award of \$58,995.73.

As of July 27, 2000, there would be due and owing to Ms. Smith 28.15 weeks of temporary total disability compensation at \$269.35 per week, or \$7,582.20, plus 150.85 weeks of permanent partial disability compensation at \$269.35 per week, or \$40,631.45, for a total due and owing of \$48,213.65, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$10,782.08 shall be paid at \$269.35 per week until further order of the Director.

The Appeals Board adopts those orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul V. Dugan, Jr., Wichita, KS
Richard J. Liby, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director